FILED
OCT 16 1992
OFFICE OF THE CLERK

(2)

No. 92-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAREY F. SHARP, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., and
DOES 1 THROUGH 10,

Respondents.

Consolidated with
NINA M. ABBOTT, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., a Delaware Corporation,
and JOHN DOES 1 through 25

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

HENRY C. THUMANN
(Counsel of Record)
WALLACE M. ALLAN
BERNARD C. BARMANN, JR.
O'MELVENY & MYERS
400 So. Hope Street
Los Angeles, Calif. 90071-2899
Telephone: (213) 669-6000

Attorneys for Respondent United Airlines, Inc.

October 15, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Do the former employees of a defunct airline have antitrust standing to recover treble damages under the Clayton Act for lost wages and benefits stemming from their employer's business failure which, in turn, was assertedly caused by the Respondent's unlawful monopolization of the air transportation markets in which it and the employer competed?

2. Did the District Court apply Colorado law correctly in dismissing Petitioners' state antitrust claims for lack of antitrust standing?

3. Did the District Court apply Colorado law correctly in dismissing Petitioners' tortious interference and third-party contract claims because they failed to state a cognizable claim?

RULE 29.1 STATEMENT

The parent company of United Airlines, Inc. is UAL Corporation. Except for wholly owned subsidiaries, there are no subsidiaries of United Airlines, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT	6
I. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S GOVERNING TEST FOR ANTITRUST STANDING	7
II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS	9
III. THE STATE LAW ISSUES RAISED BY PETITIONERS OFFER NEITHER THE SPECIAL NOR IMPORTANT REASONS NECESSARY TO INVOKE THIS COURT'S REVIEW	11
A. There Is No Basis for Review of Petitioners' State Antitrust Claims	12
B. There Is No Basis for Review of Petitioners' State Common Law Claims	13
IV. CONCLUSION	15

TABLE OF AUTHORITIES

CASES	PAGE(S)
Adams v. Pan Am. World Airways, Inc., 828 F.2d 24 (D.C. Cir. 1987), cert. denied, 485 U.S. 961 (1988)	10-11
Air Courier Conference v. American Postal Workers Union, ___U.S. ___, 111 S. Ct. 913 (1991)	10
Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1603 (1992)	9
Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926)	10
Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	6-11
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	8
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	8, 11
Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986)	11
Curtis v. Campbell-Taggart, Inc., 687 F.2d 336 (10th Cir.), cert. denied, 459 U.S. 1090 (1982)	10
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	14
Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. Ct. App. 1981)	14
E.B. Roberts Constr. Co. v. Concrete Contractors, 704 P.2d 859 (Colo. 1985)	13
Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987)	10
Ellis v. Dixon, 349 U.S. 458 (1955)	
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	12
Estate of Spiegel v. Commissioner of Internal Revenue, 335 U.S. 701 (1949)	12
Huddleston v. Dwyer, 322 U.S. 232 (1944)	12
Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)	10

PAGE(S)

Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938) 7

Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967) 10

People ex rel. Woodward v. Colorado Springs Bd. of Realtors, 692 P.2d 1055 (Colo. 1984) 12

People v. North Ave. Furniture & Appliance, 645 P.2d 1291 (Colo. 1982) 12

Pitchford v. Pepi, Inc., 531 F.2d 92 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976) 10

Province v. Cleveland Press Publishing Co., 787 F.2d 1047 (6th Cir. 1986) 10

Radovich v. National Football League, 352 U.S. 445 (1957) .. 10

Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942) . 10

Sharp v. United Airlines, Inc., 967 F.2d 404 (10th Cir. 1992) 3, 7-12, 14

Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374 (7th Cir. 1987) 9-10

Summerhouse Condominium Ass'n. Inc. v. Majestic Sav. & Loan Ass'n, 615 P. 2d 71 (Colo. Ct. App. 1980.) 13

Winther v. DEC Int'l, Inc., 625 F.Supp. 100 (D. Colo. 1985) .. 12

STATUTES AND RULES

Clayton Act § 4, 15 U.S.C. § 15 (1988) 2

Clayton Act §§ 2, 3, 15 U.S.C. §§ 13, 14 (1988) 6

Colo. Rev. Stat. § 6-2-108 2

Colo. Rev. Stat. § 6-4-101 2

Fed. R. Civ. P. 12(b)(6) 2-3

Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1988) 6

Sup. Ct. R. 10.1 12

OTHER AUTHORITIES

Restatement (Second) of Torts § 766B (1977) 14

No. 92-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAREY F. SHARP, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., and
DOES 1 THROUGH 10,

Respondents.

Consolidated with
NINA M. ABBOTT, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., a Delaware Corporation,
and JOHN DOES 1 through 25

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners in these two consolidated cases are former pilots, flight attendants, ticket agents, reservation agents and station agents of Frontier Airlines, Inc.[1] Frontier suspended operations and filed for bankruptcy in August 1986. By this action the former employees seek to hold Respondent United Airlines responsible for their loss of employment which resulted from Frontier's demise.

To that end, in August, 1990, they filed a complaint in the United States District Court for the District of Colorado naming United as the only defendant. Alleging that Frontier's failure was the result of various violations of the federal antitrust laws directed against it by United, Petitioners sought treble damages under the Clayton Act[2] for wages and other employee benefits lost as a result of the discontinuance of their Frontier employment.

Petitioners' complaint additionally included a number of state-law causes of action. The first was an antitrust claim, identical to their federal claim, asserted under the Colorado Restraint of Trade and Unfair Practices statutes.[3] A second was a common law tort claim charging that United had diverted passengers from Frontier and had thereby tortiously interfered with Petitioners' prospective economic advantage. Finally, as asserted beneficiaries of unrelated contracts between, respectively, United and Frontier and United and Frontier's corporate parent, People Express, Petitioners sought to pursue separate claims for United's alleged breach of each agreement.

On May 22, 1991 the District Court entered its order granting United's motion brought pursuant to Fed. R. Civ.

[1] The plaintiffs in *Sharp* are 342 former Frontier pilots. The plaintiffs in *Abbott* are 272 other former Frontier employees. The *Sharp* and *Abbott* plaintiffs are proceeding with this petition on a consolidated basis because their appeals below were consolidated by order of the Tenth Circuit Court of Appeals. (Order, July 12, 1991.) Because the *Sharp* Complaint and the *Abbott* Amended Complaint are substantively identical, they are herein treated as a single complaint.

[2] Clayton Act § 4, 15 U.S.C. § 15 (1988).

[3] Colo. Rev. Stat. §§ 6-2-108, 6-4-101.

P. 12(b)(6) for failure to state a claim.[4] The District Court ruled that Petitioners lacked antitrust standing under both federal and state antitrust law to recover for the derivative damage they suffered on account of the alleged antitrust injury visited on their employer. (Rec. 144.)[5] The Court further ruled that Petitioners' tortious interference cause of action failed to state a claim under Colorado common law because the affected economic relationship was between the allegedly diverted passengers and Frontier and not between such passengers and Petitioners. *Id.* Finally, the District Court dismissed the breach of contract claims because Petitioners' allegations failed to establish a basis for according them third-party enforcement status under Colorado common law. *Id.*

Without moving the District Court for leave to amend their pleading, Petitioners filed a timely appeal to the United States Court of Appeals for the Tenth Circuit. Reviewing the sufficiency of the complaint *de novo*, the Court of Appeals on June 17, 1992 issued its opinion affirming "the district court's dismissal of plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim." (App. A at 20, 967 F.2d 404, 410.)[6] The present Petition seeks review of that ruling.

STATEMENT OF FACTS

Petitioners' Complaint alleges that prior to August 24, 1986, they were pilots and other employees of Frontier Air-

[4] The District Court's order is reproduced in Petitioners' Appendix at p. B1.

[5] The District Court delivered an oral opinion explaining its ruling which is reported as part of the transcript of proceedings on Respondent's motion. The record on appeal is contained in the Appendix to Appellant's Consolidated Opening Brief which was filed with the Court of Appeals. Citations in this brief to the record on appeal are to that Appendix as paginated below and are indicated by the reference "Rec." The District Court's oral opinion begins at Rec. 137.

[6] Appendix A to the Petition is represented as a reprint of the opinion of the Court below. It is, however, replete with typographic and other errors which tend to impair its reliability. This brief accordingly provides joint citations to Petitioners' Appendix ("App. A") and to the Federal Reporter. The latter reports the Court of Appeals decision as *Sharp v. United Airlines, Inc.*, 967 F.2d 404 (10th Cir. 1992).

lines, Inc. (Complaint ¶ 1, Rec. 3, 28.) On that date, Frontier suspended operations; two days later it filed for bankruptcy. (Complaint ¶¶ 1, 53, Rec. 3, 14, 28, 38.) As a result, petitioners lost their jobs. (Complaint ¶ 57, Rec. 14, 38.)

Prior to Frontier's suspension of operations, it competed with United in the air transportation market between various city-pairs served by each carrier as part of its respective hub operations at Denver's Stapleton International Airport. (Complaint ¶ 7, Rec. 4, 28.) In addition to that competitive relationship, Frontier was a contract participant in United's Computerized Reservation System ("CRS") known as Apollo. (Complaint ¶¶ 13, 32, Rec. 5, 9, 30, 34.)

Apollo is one of a number of competing systems each of which in its essential consists of a computer terminal located at a subscribing travel agent's place of business. The terminal provides flight, fare and seat availability information via computer display while simultaneously enabling the agent to effect customer booking and ticketing via direct computer input. (Complaint ¶¶ 11, 12, 15, Rec. 5, 6, 29-30.) Apollo-equipped agents were able to use that system to book and sell tickets on various airlines, including both Frontier and United. (Complaint ¶ 13, Rec. 5, 30.) United made Apollo available to subscribing travel agents for a fee. (Complaint ¶ 15, Rec. 6, 30.)

Petitioners' antitrust charges embrace a number of distinct United activities. First, United is alleged to have an illegal monopoly as to its own Apollo CRS and, in the Denver area, as to CRS's generally. (Complaint ¶ 17, Rec. 6, 31.) Pursuant to such monopoly power, United is asserted to have both overcharged Frontier for its participation in Apollo and caused Apollo to operate in a manner which unfairly disadvantaged the sale of Frontier tickets relative to those of United. (Complaint ¶¶ 21, 27, 37, 46, Rec. 7, 8, 10-11, 12, 32, 33, 35, 36-37.) While Frontier is not alleged to have competed with United in the CRS market, United's CRS-related conduct is asserted to have weakened Frontier's competitive position in the air transportation market where it

purportedly suffered higher costs and reduced revenues. (Complaint ¶¶ 45, 46, Rec. 12, 36.)

A second cluster of conduct challenged by petitioners' antitrust claims concerns United's purchases of certain Frontier assets in early 1985 and July 1986, respectively. (Complaint ¶¶ 47, 51, Rec. 12, 13, 37.) Petitioners contend that these transactions represented distress sales made by Frontier at less than fair value. (Complaint ¶¶ 47, 52, Rec. 12, 13, 37-38.) The sales are alleged to have been precipitated by Frontier's need to shore up a financial condition which had assertedly been weakened by United's CRS activities. (Complaint ¶¶ 47, 53, Rec. 12, 13, 37, 38.)

United is additionally alleged to have entered a July 10, 1986 contract with Frontier's then corporate owner (People Express Airlines) in bad faith. (Complaint ¶ 50, Rec. 13, 37.) Contingent on certain conditions being timely met, the contract called for United to purchase from People Express all of Frontier's outstanding stock. In addition, prior to the stock purchase closing, the contract permitted United to purchase certain stated Frontier assets (two Stapleton Airport hangars and a total of thirteen landing slots at three airports) at specified prices. (Complaint ¶ 51, Rec. 13, 37.) While United proceeded with the asset purchase,[7] the conditions to the stock purchase agreement were ultimately not met and that transaction accordingly never closed. (Complaint ¶¶ 50, 53, Rec. 13, 37, 38.) The totality of this transaction is alleged to have left Frontier in such a weakened financial condition that it soon failed. (¶¶ Complaint 53, Rec. 13, 38.)

Petitioners alleged that both United's CRS activities and its asset acquisition activities were undertaken with the specific intent of achieving a monopoly in the city-pair air transportation markets in which it competed with Frontier. (Complaint 56, Rec. 14, 38.) Petitioners further alleged that United's conduct and success in driving Frontier from the Denver city-pair air transportation markets constituted a

[7] This is the same July 1986 asset purchase referred to in the previous paragraph. *See* p. 5, *supra*.

violation of Sections 1 and 2 of the Sherman Act[8] and Sections 2 and 3 of the Clayton Act.[9] (Complaint ¶¶ 56, 60, 64, 68, 72, 99, 103, Rec. 14, 15, 16, 20-21, 38, 39, 41, 45, 46.) Finally, Petitioners alleged that as a consequence of Frontier's failure they suffered "loss of employment wages, loss of employment benefits, and loss of employment contributions" as to which they sought treble recovery under the federal and Colorado antitrust laws. (Complaint ¶¶ 57, 61, 65, 69, 73, 100, 104, Rec. 14-15, 16-17, 21-22, 38, 39-40, 41, 45, 46.)

In addition to these various antitrust claims, Petitioners alleged that United breached a contract with Frontier whereby it had accorded the latter a preferred participation status in United's Apollo CRS. (Complaint ¶ 87, Rec. 19, 43.) Similarly, Petitioners alleged that United breached the 1986 stock purchase agreement with People Express. (Complaint ¶ 114, Rec. 23, 47-48.) While not claiming to be a primary party to either contract, Petitioners claimed third-party beneficiary enforcement status alleging that faithful performance by United would have preserved Frontier and derivatively benefited its employees. (Complaint ¶¶ 89, 115, Rec. 19, 23, 43-44, 48.)

Finally, Petitioners' complaint asserted that United had manipulated its CRS system so as to divert passengers from Frontier to United, and that such conduct constituted an interference with Petitioners' prospective economic advantage. (Complaint ¶ 91, Rec. 19, 44.)

REASONS FOR DENYING THE WRIT

The only question of federal law presented by the Petition concerns the antitrust standing of an employee to recover job-loss related damages from her failed employer's competitor where the latter has assertedly monopolized the market in which it and the failed employer competed. That issue is governed by this Court's multi-part test articulated in *Associated General Contractors, Inc. v. California*

[8]Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1988).

[9]Clayton Act §§ 2, 3, 15 U.S.C. §§ 13, 14 (1988).

State Council of Carpenters, 459 U.S. 519 (1983). Both the District Court and the Court of Appeals applied that test faithfully in dismissing Petitioners' claim.[10] Moreover, every circuit court which has had occasion to consider the question has likewise concluded that employees lack antitrust standing for such derivative injury.[11] Lastly, the issues of state law raised by Petitioners offer neither special nor important reasons to invoke this Court's discretionary power of review.[12]

I. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S GOVERNING TEST FOR ANTITRUST STANDING

As directed by this Court's opinion in *Associated General Contractors*, the Court below determined Petitioners' antitrust standing pursuant to an evaluation of "the Plaintiffs' harm, the alleged wrongdoing by the Defendants, and the relationship between them." 459 U.S. at 534. In doing so, it accepted "all the well-pleaded allegations of the complaint as true" and construed them "in the light most favorable" to Petitioners. (App. A at 12, 967 F.2d at 406.)[13] As so construed, it proceeded to measure Petitioners' allegations by each of the factors articulated in this Court's *Associated General Contractors*' multi-part test for antitrust standing.

Like the labor unions denied standing in that case, Petitioners were neither participants nor consumers in the markets at which the purported antitrust violations were direct-

[10] *See* discussion at pp. 7-9, *infra*.

[11] *See* discussion at pp. 9-11, *infra*.

[12] *See* discussion at pp. 11-14, *infra*.

[13] The Petition for Writ of Certiorari is replete with references to legal conclusions which by Petitioners' contention entitle them to proceed to trial without regard to whether they are supported by or consistent with the complaint's factual allegations. *See, e.g.*, Petition at 2, 3, 4, 7-9, n.11, n.12, n.13, n.14, 11-12, 14, 16, n.29. While the Court of Appeals fully credited Petitioners' factual allegations, it no more than this Court is compelled to accept mere legal conclusions. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938).

ed.[14] Those markets were air transportation markets, not the labor markets in which Petitioners participated. As the Court below observed, Petitioners did not suffer injury of the type " 'that flows from that which makes defendant's acts unlawful.' " (App. A at 15-16, 967 F.2d at 408 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).) It was their employer and not Petitioners who suffered any breakdown in competitive conditions in the air transportation market. (App. A at 16, 967 F.2d at 408.)[15] Indeed, as the Court of Appeals pointed out, "the effect on airline industry employees of a reduction in competition in that industry is unclear." (App. A at 16 n.5, 967 F.2d at 408 n.5.)[16] Thus, while Petitioners' loss of employment with Frontier may be casually linked to the defendant's alleged antitrust violations, it is merely "tangential" to any competitive harm in the affected air transportation markets and does not itself constitute antitrust injury. (App. A at 16, 967 F.2d at 408.)[17]

In addition, again like the labor union's injury in *Associated General Contractors*, Petitioners' damage is indirect, being merely derivative of the injury assertedly suffered by Frontier. (App. A at 17-18, 967 F.2d at 408-09.)[18] There are accordingly other parties better situated to vindi-

---

[14]There is no basis for Petitioners' reliance on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Its inapplicability to claims of the nature here in issue was expressly discussed in this Court's *Associated General Contractors* opinion. It was there pointed out that "McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services." *Associated General Contractors*, 459 U.S. at 538. By contrast, the labor union in *Associated General Contractors*, like Petitioners here, enjoyed no such status: "In this case, [unlike *McCready*] however, the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539. On the basis of that distinction, this Court denied the Union antitrust standing. *Id.* at 538-40. The distinction is equally applicable to Petitioners and necessarily renders *McCready* irrelevant here.

[15]Compare *Associated General Contractors*, 459 U.S. at 541.

[16]Compare *Associated General Contractors*, 459 U.S. at 539.

[17]Compare *Associated General Contractors*, 459 U.S. at 540-541.

[18]Compare *Associated General Contractors*, 459 U.S. at 541.

cate any meritorious antitrust claim embraced by Petitioners' allegations. (App. A at 17 n.6, 967 F.2d at 409 n.6.)[19]

Petitioners' damage claims, moreover, are highly speculative. Each individual claim would depend on the employment tenure the particular employee would otherwise have enjoyed with Frontier—with what advancement, with what salary, and with what mitigating alternative opportunities. (App. A at 18-19, 967 F.2d at 409-10.)[20] And lastly, Petitioners' claims present clear potential for duplicative recovery. (App. A at 19, 967 F.2d at 410.) Indeed, this Court has itself pointed out the difficulty a District Court would face in identifying and apportioning damages among "directly victimized" employers and "indirectly affected employees." *Associated General Contractors*, 459 U.S. at 545.

As is thus apparent, the decision below represents nothing more than a straightforward application of this Court's established multi-factor test for antitrust standing. The Court of Appeals' manifestly correct application of that test demonstrates clearly that Petitioners lack standing to prosecute the federal antitrust violations asserted in their complaint. There is accordingly no occasion for the intervention of this Court.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS

Petitioners do not contend, nor could they, that there is a conflict among the circuits on the issue of whether employees have antitrust standing to recover derivative damages resulting from antitrust violations visited on their employer. On the contrary, every Court of Appeals that has considered the issue has denied such standing. *See Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n,*

---

[19]Compare *Associated General Contractors*, 459 U.S. at 541-542. Indeed, such claims have been brought by various other airlines and have been determined to be without merit. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1603 (1992).

[20]Compare *Associated General Contractors*, 459 U.S. at 542-543.

830 F.2d 1374, 1378 (7th Cir. 1987); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 543 (9th Cir. 1987); *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047, 1050-54 (6th Cir. 1986); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710-11 (11th Cir. 1984); *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir.), *cert. denied*, 459 U.S. 1090 (1982); *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 96-97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).[21] Indeed, this Court has itself observed that "[e]mployees have generally been denied standing to enforce competition laws because they lack competitive and direct injury." *Air Courier Conference v. American Postal Workers Union*, ___ U.S. ___, 111 S. Ct. 913, 920 n.5 (1991).

Unable to assert a conflict on the decided issue of antitrust standing, Petitioners rely on dictum in *Adams*[22] to conjure disagreement on the subsidiary issue of antitrust injury. While the *Adams* court and the Court below reached the common conclusion that employees in Petitioners' situation lack antitrust standing, they disagreed as to the procedure appropriate for determination of a single component of the *Associated General Contractors* multi-factor test.

Dictum in *Adams* suggests that a trial is necessary to permit a determination of whether or not terminated employees of a defunct airline suffered antitrust injury. *See Adams v. Pan Am. World Airways, Inc.*, 828 F.2d at

[21] There are two situations, neither of which is implicated here, in which employees have been accorded antitrust standing. One is where the antitrust restraint is directed at the labor market itself. *See Radovich v. National Football League*, 352 U.S. 445 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). The other concerns contract commission agents who sell their principals' wares in the economic markets in which competition is restrained. *See, e.g., Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). The court below recognized both these exceptions but quite correctly distinguished them from the derivative-injury claim presented by the instant complaint. (App. A at 15 n.4, 967 F.2d 404, 408 n.4.)

[22] *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

27.[23] In the view of the Court below, however, that determination is in the present circumstances resolved as a matter of law by this Court's decision in *Associated General Contractors*. (App. A at 14, 967 F.2d at 407-08.)[24] But this minor difference played no controlling role in the conclusion of either Circuit Court: the *Adams* court denied antitrust standing as a matter of law despite its antitrust–injury dictum,[25] while the Court below made plain that "even were we to assume antitrust injury, . . . we would hold, as did the Court in *Adams*, that the other factors relevant to standing doom plaintiffs' claims." Compare App. A at 16, 967 F.2d 404, 408, with *Adams*, 828 F.2d 24, 25-6.

Given the broad and unanimous Circuit Court view on the standing issue actually decided, such a limited difference on a subordinate matter expressed only in dicta hardly warrants the intervention of this Court.

III. THE STATE LAW ISSUES RAISED BY PETITIONERS OFFER NEITHER THE SPECIAL NOR IMPORTANT REASONS NECESSARY TO INVOKE THIS COURT'S REVIEW

This Court has long recognized that the ultimate responsibility for determining state law resides not with it but

---

[23] Such a trial would evaluate whether an enhanced level of industry competition would have raised output in such a manner as to result in higher wages, or whether it would have brought on increased pressure to cut costs by reducing wages. 828 F.2d at 27. Such an approach is not only wholly unworkable, but it is in direct conflict with this Court's analysis of antitrust injury as explicated in *Associated General Contractors*. *See* 459 U.S. at 539.

[24] *See also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

[25] Antitrust injury is but one component of antitrust standing: "A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons. . . . Thus, in *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986).

with the highest court of the state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, where reasonable arguments have been advanced to support a determination of state law made by a federal court of appeals, this Court has found it "wholly unprofitable for us to analyze [the state] cases on the point." *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949). It has for that reason become the policy of the Court to "accept and therefore . . . not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Indeed, as Rule 10.1 of the Rules of this Court admonishes, discretionary review should be granted only for "special and important reasons," and that is doubly so where the controlling questions are of local law.

A. There Is No Basis for Review of Petitioners' State Antitrust Claims.

Petitioners' state antitrust claims are based on the same factual allegations and the same alleged injury as their federal antitrust claims. (Complaint ¶¶ 74, 77, 78, 81, 82, 85, 105, 108, 109, 112, Rec. 17, 18, 22, 23, 41-42, 43, 46-47.) The Colorado Supreme Court has expressly recognized that there is a "substantial similarity in text and purpose present in the federal and state antitrust statutes." *People v. North Ave. Furniture & Appliance*, 645 P.2d 1291, 1295 (Colo. 1982). It has accordingly held that federal antitrust precedent is entitled to "careful scrutiny" in resolving state antitrust questions. *People ex rel. Woodward v. Colorado Springs Bd. of Realtors*, 692 P.2d 1055, 1061 (Colo. 1984). In the absence of Colorado decisional law treating of employee antitrust standing, it is entirely consistent with such direction for a federal court to apply the same test of state antitrust standing as it uses to determine federal standing. *See Winther v. DEC Int'l, Inc.*, 625 F.Supp. 100, 104 (D. Colo. 1985). That was the altogether correct conclusion of the Court below. (App. A at 19-20, 967 F.2d at 410.)

B. There Is No Basis for Review of Petitioners' State Common Law Claims.

Petitioners' contract claims derive from United's alleged breach of its 1982 CRS contract with Frontier and its July 1986 stock purchase agreement with People Express. (Complaint ¶¶ 87 and 114, Rec. 19, 23, 43, 47-48.) Colorado law does not accord contract-enforcement status to third-party beneficiaries unless the primary contracting parties affirmatively intended to so bestow the particular benefit resulting from their agreement; it is not enough that the benefit arises as a mere incident of a separate purpose. *E.B. Roberts Construction Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985); *Summerhouse Condominium Ass'n., Inc. v. Majestic Sav. & Loan Ass'n*, 615 P. 2d 71, 73 (Colo. Ct. App. 1980).

According to the complaint, the CRS agreement provided the terms and conditions under which Frontier's flights would be displayed on the Apollo CRS system. (Complaint ¶¶ 24-25 and 32-34, Rec. 7-8, 9-10, 32, 34.) The contract allegations contained in the Complaint make no mention of Frontier's employees, nor of *any* intention on the part of United or Frontier to benefit such employees. Nor would such allegations be credible if made. The CRS agreement was quite obviously for the benefit of Frontier. Its employees received, at most, only an incidental benefit from the additional business generated by Frontier's participation in the Apollo system.

Petitioners' claim to enforcement status with respect to the 1986 stock purchase agreement is even more strained. In 1986 People Express owned the stock of Frontier. United contracted with People Express to buy the stock under specified terms and conditions. (Complaint ¶ 50, Rec. 13, 37.) Any purported obligation to purchase the stock was necessarily owed to People Express. Absent some allegation of a special purpose—and there is none—there is no basis for according intended beneficiary status even to Frontier, much less to

Frontier's employees who enjoyed no relationship whatever with either of the contracting parties.[26]

Petitioners' tortious interference claim asserted that United diverted "passengers from Frontier through the Apollo mechanism." (Complaint ¶ 91, Apx. Rec. 19, 44.) Colorado follows the Restatement (Second) of Torts with respect to tortious interference, including interference with prospective business advantage. *See Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. Ct. App. 1981). Under the Restatement (Second) section 766B, a party is liable for "intentionally and improperly" interfering "with another's prospective contractual relation" if the party induces or otherwise causes a third person not to enter into or continue the prospective relation, or prevents the other from acquiring or continuing the prospective relation.

Petitioners do not allege interference with any prospective business relationship of their own. As employees of Frontier, they could not have contracted in their own right to provide air travel services to the allegedly diverted passengers—only Frontier could have so contracted. They accordingly had no personal prospect of any future business relationship with which United's alleged conduct could have interfered.

The Court below affirmed the district court's dismissal of Petitioners' various common law claims because "[p]laintiffs' cursory arguments do not convince us that the district court erred." (App. A at 20, 967 F.2d at 410.) Petitioners' cursory arguments below have all but disappeared completely in their petition to this Court. There is accordingly no basis for invocation of this Court's review.

---

[26] Petitioners' argument that Respondent's motion should have been "treated as one for summary judgment" is inexplicable. Respondent presented no extraneous materials in support of its motion and none were relied on by the District Court. (Rec. 55, 59, 137.) Moreover, Petitioners never raised this objection in either the District or Circuit Court. They may not do so for the first time here. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the instant petition for grant of a writ of certiorari.

HENRY C. THUMANN
(Counsel of Record)
WALLACE M. ALLAN
BERNARD C. BARMANN, JR.
O'MELVENY & MYERS

Attorneys for Respondent
United Airlines, Inc.

October 15, 1992